

place from which the worker, without intervening employment, has come to work for the employer to the place of employment. Daily subsistence shall be computed as set forth in paragraph (b)(5)(i) of this section. The amount of the transportation payment shall be no less (and shall not be required to be more) than the most economical and reasonable similar common carrier transportation charges for the distances involved.

(13) *Deductions.* The employer shall make those deductions from the worker's paycheck which are required by law. The job offer shall specify all deductions not required by law which the employer will make from the worker's paycheck. All deductions shall be reasonable. The employer may deduct the cost of the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer. In such cases, the job offer shall state that the worker will be reimbursed the full amount of such deductions upon the worker's completion of 50 percent of the worker's contract period. However, an employer subject to the Fair Labor Standards Act (FLSA) may not make deductions which will result in payments to workers of less than the federal minimum wage permitted by the FLSA as determined by the Secretary at 29 CFR part 531.

(14) *Copy of work contract.* The employer shall provide to the worker, no later than on the day the work commences, a copy of the work contract between the employer and the worker. The work contract shall contain all of the provisions required by paragraphs (a) and (b) of this section. In the absence of a separate, written work contract entered into between the employer and the worker, the required terms of the job order and application for temporary alien agricultural labor certification shall be the work contract.

(c) *Appropriateness of required qualifications.* Bona fide occupational qualifications specified by an employer in a job offer shall be consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops, and shall be reviewed by the RA

for their appropriateness. The RA may require the employer to submit documentation to substantiate the appropriateness of the qualification specified in the job offer; and shall consider information offered by and may consult with representatives of the U.S. Department of Agriculture.

(d) *Positive recruitment plan.* The employer shall submit in writing, as a part of the application, the employer's plan for conducting independent, positive recruitment of U.S. workers as required by §§ 655.103 and 655.105(a) of this part. Such a plan shall include a description of recruitment efforts (if any) made prior to the actual submittal of the application. The plan shall describe how the employer will engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location(s)) no less than that of non-H-2A agricultural employers of comparable or smaller size in the area of employment. When it is the prevailing practice in the area of employment and for the occupation for non-H-2A agricultural employers to secure U.S. workers through farm labor contractors and to compensate farm labor contractors with an override for their services, the employer shall describe how it will make the same level of effort as non-H-2A agricultural employers and provide an override which is no less than that being provided by non-H-2A agricultural employers.

§ 655.103 Assurances.

As part of the temporary alien agricultural labor certification application, the employer shall include in the job offer a statement agreeing to abide by the conditions of this subpart. By so doing, the employer makes each of the following assurances:

(a) *Labor disputes.* The specific job opportunity for which the employer is requesting H-2A certification is not vacant because the former occupant is on strike or being locked out in the course of a labor dispute.

(b) *Employment-related laws.* During the period for which the temporary alien agricultural labor certification is granted, the employer shall comply with applicable federal, State, and

local employment-related laws and regulations, including employment-related health and safety laws.

(c) *Rejections and terminations of U.S. workers.* No U.S. worker will be rejected for or terminated from employment for other than a lawful job-related reason, and notification of all rejections or terminations shall be made to the local office.

(d) *Recruitment of U.S. workers.* The employer shall independently engage in positive recruitment until the foreign workers have departed for the employer's place of employment and shall cooperate with the ES System in the active recruitment of U.S. workers by:

(1) Assisting the ES System to prepare local, intrastate, and interstate job orders using the information supplied on the employer's job offer;

(2) Placing advertisements (in a language other than English, where the RA determines appropriate) for the job opportunities in newspapers of general circulation and/or on the radio, as required by the RA:

(i) Each such advertisement shall describe the nature and anticipated duration of the job opportunity; offer at least the adverse effect wage rate; give the $\frac{3}{4}$ guarantee; state that work tools, supplies and equipment will be provided by the employer; state that housing will also be provided, and that transportation and subsistence expenses to the worksite will be provided or paid by the employer upon completion of 50% of the work contract, or earlier, if appropriate; and

(ii) Each such advertisement shall direct interested workers to apply for the job opportunity at a local employment service office in their area;

(3) Cooperating with the ES System and independently contacting farm labor contractors, migrant workers and other potential workers in other areas of the State and/or Nation by letter and/or telephone; and

(4) Cooperating with the ES System in contacting schools, business and labor organizations, fraternal and veterans' organizations, and nonprofit organizations and public agencies such as sponsors of programs under the Job Training Partnership Act throughout the area of intended employment and in other potential labor supply areas in

order to enlist them in helping to find U.S. workers.

(e) *Fifty-percent rule.* From the time the foreign workers depart for the employer's place of employment, the employer, except as provided for by § 655.106(e)(1) of this part, shall provide employment to any qualified, eligible U.S. worker who applies to the employer until 50% of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed. In addition, the employer shall offer to provide housing and the other benefits, wages, and working conditions required by § 655.102 of this part to any such U.S. worker and shall not treat less favorably than H-2A workers any U.S. worker referred or transferred pursuant to this assurance.

(f) *Other recruitment.* The employer shall perform the other specific recruitment and reporting activities specified in the notice from the RA required by § 655.105(a) of this part, and shall engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location) no less than that of non-H-2A agricultural employers of comparable or smaller size in the area of employment. When it is the prevailing practice in the area of employment and for the occupation for non-H-2A agricultural employers to secure U.S. workers through farm labor contractors and to compensate farm labor contractors with an override for their services, the employer shall make the same level of effort as non-H-2A agricultural employers and shall provide an override which is no less than that being provided by non-H-2A agricultural employers. Where the employer has centralized cooking and eating facilities designed to feed workers, the employer shall not be required to provide meals through an override. The employer shall not be required to provide for housing through an override.

(g) *Retaliation prohibited.* The employer shall not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, and shall not cause any person to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, any person who has with just cause:

(1) Filed a complaint under or related to §216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to §216 of the INA;

(2) Instituted or caused to be instituted any proceeding under or related to §216 of the INA, or this subpart or any other DOL regulation promulgated pursuant to §216 of the INA (8 U.S.C. 1186);

(3) Testified or is about to testify in any proceeding under or related to §216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to §216 of the INA;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to §216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to §216 of the INA; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by §216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to §216 of the INA.

(h) *Fees.* The application shall include the assurance that fees will be paid in a timely manner, as follows:

(1) *Amount.* The fee for each employer receiving a temporary alien agricultural labor certification is \$100 plus \$10 for each job opportunity for H-2A workers certified, provided that the fee for an employer for each temporary alien agricultural labor certification received shall be no greater than \$1,000. In the case of a joint employer association receiving a temporary alien agricultural labor certification, the fee for each employer-member receiving a temporary alien agricultural labor certification shall be \$100 plus \$10 for each job opportunity for H-2A workers certified, provided that the fee for an employer for each temporary alien agricultural labor certification received shall be no greater than \$1,000. The joint employer association will not be charged a separate fee. Fees shall be paid by a check or money order made payable to "Department of Labor", and are nonrefundable. In the case of employers of H-2A workers which are members of a joint employer association applying on their behalf, the aggregate fees for all employers of H-2A

workers under the application may be paid by one check or money order.

(2) *Timeliness.* Fees received by the RA within 30 calendar days after the date of the temporary alien agricultural labor certification determination are timely.

[52 FR 20507, June 1, 1987, as amended by 55 FR 29358, July 19, 1990]

§ 655.104 Determinations based on acceptability of H-2A applications.

(a) *Local office activities.* The local office, using the job offer portion of the H-2A application, shall promptly prepare a local job order and shall begin to recruit U.S. workers in the area of intended employment. The RA should notify the State or local office by telephone no later than seven calendar days after the application was received by the RA if the application has been accepted for consideration. Upon receiving such notice or seven calendar days after the application is received by the local office, whichever is earlier, the local office shall promptly prepare an agricultural clearance order which will permit the recruitment of U.S. workers by the Employment Service System on an intrastate and interstate basis.

(b) *Regional office activities.* The RA, upon receipt of the H-2A application, shall promptly review the application to determine whether it is acceptable for consideration under the timeliness and adverse effect criteria of §§655.101–655.103 of this part. If the RA determines that the application does not meet the requirements of §§655.101–655.103, the RA shall not accept the application for consideration on the grounds that the availability of U.S. workers cannot be adequately tested because the benefits, wages and working conditions do not meet the adverse effect criteria; however, if the RA determines that the application is not timely in accordance with §655.101 of this part and that neither the first-year employer provisions of §655.101(c)(5) nor the emergency provisions of §655.101(f) apply, the RA may determine not to accept the application for consideration because there is not sufficient time to test the availability of U.S. workers.